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U.S. Citizenship
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FEB 24 2004

FILE: WAC 02 174 53289 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner is a church. It seeks to employ the beneficiary permanently in the United States as a bilingual secretary. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the petition's priority date is January 14, 1998. The beneficiary's salary as stated on the labor certification is \$11.73 per hour, which equates to \$24,398.40 per annum.

On August 9, 2002, the director requested evidence that the petitioner had the ability to pay the beneficiary the proffered wage. The director's generic request asked for evidence covering the period 1998 to 2001, noting that such evidence should be in the form of annual reports, federal tax returns, or audited financial statements.

In response to the director's request, counsel for the petitioner submitted evidence that the petitioner, as a church, is exempt from taxation pursuant to section 501(c)(3) of the Internal Revenue Code. Counsel had submitted this documentation on initial filing. Counsel also submitted Forms W-2, Wage and Tax Statements, for the beneficiary showing that the petitioner had paid her \$16,038 in 2000 and \$20,672 in 2001.

The director denied the petition, finding that the petitioner, through counsel, had not complied with his request for annual reports, federal tax returns, or audited financial statements. The director indicated that his decision would be based on the record as constituted; however, in his decision he does not indicate what he looked at in the record to make his decision.

On appeal, counsel maintains that the evidence he had furnished the director demonstrated the petitioner's ability to pay the wage. In addition, counsel submits what he describes as annual reports for the petitioner for the years 1998 to 2002 and similar reports for the Melkite Diocese of Newton, Massachusetts, to which the petitioning church belongs.

Because the petitioner is a church, the director should not have expected to receive federal income tax submissions from the petitioner. Nevertheless, counsel's argument that he had previously submitted sufficient documentation is less than convincing. On the other hand, the additional documentation submitted on appeal must be given due consideration.

The annual reports referred to above might also be seen as unaudited financial statements. Certain questions arise. What is an annual report? May a tax-exempt petitioner submit other documentation to establish the ability to pay the wage if said petitioner does not have annual reports or audited financial statements?

Neither the regulations nor the supplementary information to the proposed rule of July 5, 1991, (56 FR 30703), or the final rule of November 29, 1991, (56 FR 60897), define the term "annual report." What, then, is an annual report? Experience indicates that such a report might range from a glossy yearbook produced by large corporation to a simple annual report of financial solvency available to the stockholders of a small business, or, in the case of a church, to a board of directors or the church's congregants.

Regarding the requirements of the regulation, 8 C.F.R. § 204.5(g)(2) states that evidence of ability to pay the wage "shall" be in the form "copies of annual reports, federal tax returns, or audited financial statements." The regulation goes on to say that, in appropriate cases, a petitioner may submit, or CIS may request, additional evidence. According to Webster's II: New Riverside University Dictionary, 1984, (commonly in CIS usage), the first meaning of the word "shall" is "should;" the secondary meaning of the word "shall" is "must." Nothing in the regulation or the supplementary information to the proposed or final regulations of 1991 indicates that the framers of the regulation intended to be so restrictive as to close the door to reasonable scrutiny of any and all evidence. Certainly, a case will be stronger if it is accompanied by annual reports, federal tax returns, or audited financial reports; however, the regulation also implies the application of common sense. Smaller businesses do not usually produce annual reports, or are often unable to afford audited financial statements. Tax-exempt churches do not file federal tax returns.

In the case at hand, the AAO has examined the totality of the evidence of record. The record indicates that the petitioner has demonstrated the ability to pay the beneficiary the proffered wage. This conclusion is based on the increasing financial health of the petitioning church dating from 1998, the statement from the chief financial officer ("economos") of the parent diocese regarding its ultimate fiscal responsibility for its parishes, and the historic financial stability of the diocese.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained.